PP

v.

MOHD AL-AFIZI ITHNIN

HIGH COURT MALAYA, JOHOR BAHRU
JEFFREY TAN J
[CRIMINAL TRIAL NO: 45-52-2004]
4 APRIL 2008

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in 981.4 gram cannabis - Elements - Whether proved - Drugs found in black sling bag slung over accused's shoulder - Custody, control and/or possession - Whether there was reasonable inference of - Absence of evidence of an overt act - Whether drugs intended for personal consumption could be ruled out - Whether just and fair to give benefit to the accused - Whether there was no direct evidence of trafficking - Whether charge should be amended to one of possession - Dangerous Drugs Act 1952, s. 39A(2)*

CRIMINAL PROCEDURE: *Dangerous drugs - Trafficking in 981.4 gram cannabis - Elements - Whether proved - Drugs found in black sling bag slung over accused's shoulder - Custody, control and/or possession - Whether there was reasonable inference of - Absence of evidence of an overt act - Whether drugs intended for personal consumption could be ruled out - Whether just and fair to give benefit to the accused - Whether there was no direct evidence of trafficking - Whether charge should be amended to one of possession - Dangerous Drugs Act 1952, s. 39A(2)*

The accused was tried for the capital offence of trafficking 981.4 gram cannabis under s.39B(1)(a) Dangerous Drugs Act 1952 punishable under s. 39B(2) of the same Act. Briefly, the facts were that on 12 June 2003 at 2pm, Chief Inspector Arshad Kamaruddin ('SP3') had received information of a drug trafficking activity and of a Malay male with motorcycle JDD 7870 at Pam Minyak Projet, Taman Tampoi Utama. He organized a police party, proceeded to that place and took their assigned positions upon arriving at 5.30pm. About one and a half hours later, a motorcycle stopped in front of one Kedai Destina. The rider (identified as the accused) had a black sling bag slung across his shoulder. The accused entered Kedai Destina where he was approached by SP3 and Corporals Payaman and Mohd Arif. SP3 proceeded to take possession of the black sling bag slung across the shoulder of the accused. He searched the sling bag in the

presence of the accused and found inside the sling bag an orange plastic bag containing a compressed block of plant material wrapped in translucent cellophane tape and aluminium foil. SP3 then informed the accused of the offence he had committed and instructed Corporal Payaman to handcuff the accused. Subsequently, all evidence and exhibits, search list, police report and the accused were handed to the investigation officer (SP5). It was the unchallenged testimony of the government chemist (SP6) that the drug exhibits contained 981.4 grams of cannabis. At the close of the prosecution case, the accused submitted that it was only proved that the accused was in possession of the orange plastic bag; that it was not proved that the accused was in possession of the cannabis in the bag.

Held:

(1) There was no direct evidence of trafficking in the instant case. Rather, the case against the accused was built on the solitary unchallenged fact that the accused had across his shoulder a sling bag and that inside that sling bag was an orange plastic bag containing a single compressed slab or block of 981.4 grams of cannabis, wrapped with first a layer of translucent cellophane tape and then a layer of aluminium foil. On the facts, and in the absence of an explanation, the reasonable inference must be that the accused was aware of that in his custody, control and/or possession. The total absence of any evidence of an overt act would say that the circumstance that it could have been intended for personal consumption could not be ruled out. If it were possession, then trafficking was made out only on a not too strong presumption of trafficking. Of course, if it were a case of custody and/or control, then trafficking was not made out at all in the absence of any evidence of an overt act. The fate of the accused hung on that balance. A ruling that it was possession would attract the presumption of trafficking. A ruling that it was custody and/or control would mean that trafficking was not made. In the face of such a difficult choice, it would surely seem more just and fair to give the benefit to the accused, to find that the lesser offence, not the more serious, had been made out. For these reasons, the charge was amended to one of possession and punishable under s. 39A(2) of the Act, to which amended

charge the accused pleaded thereto and was accordingly sentenced to serve a term of imprisonment of nine years and to ten strokes of the cane.

[Order accordingly.]

Case(s) referred to:
Badrulsham bin Baharom v. PP [1988] 2 MLJ 585 ***(refd)***
Director of Prosecutions v. Brooks [1974] AC 862 ***(refd)***
Gooi Loo Seng v. PP [1993] 3 CLJ 1 SC ***(refd)***
Ho Seng Seng v. Rex [1951] 1 LNS 25 HC ***(refd)***
Leow Nghee Lim v. Regina [1955] 1 LNS 53 HC ***(refd)***
Mohamad Radzi Abu Bakar v. PP [2002] 3 CLJ 794 CA ***(refd)***
Mohamad Yazri Minhat v. PP [2003] 2 CLJ 65 CA ***(refd)***
Msimanga Lesaly v. PP [2004] 1 LNS 651 ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
Neo Koon Cheo v. Regina [1959] 1 LNS 64 HC ***(refd)***
Ong Ah Chuan v. PP [1980] 1 LNS 181 ***(refd)***
PP v. Abdul Manaf Muhamad Hassan [2006] 2 CLJ 129 FC ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(refd)***
PP v. Ahmad Rashdan Shamsher [1994] 1 LNS 126 HC ***(refd)***
PP v. Ang Boo Foo [1981] 1 MLJ 40 ***(refd)***
PP v. Hanif Basree Abdul Rahman [2008] 4 CLJ 1 FC ***(refd)***
PP v. Karim AB Jabar [2008] 5 CLJ 173 CA ***(refd)***
PP v. Kau Joo Huat [1988] 1 CLJ 477; [1988] 1 CLJ (Rep) 258 SC ***(refd)***
PP v. Lai Ah Bee [1974] 1 LNS 119 HC ***(refd)***
PP v. Mohd Farid Mohd Sukis & Anor [2002] 8 CLJ 814 HC ***(refd)***
PP v. Ouseng Same-Ae [2008] 1 CLJ 337 CA ***(refd)***
PP v. Reza Mohd Shah Ahmad Shah [2002] 1 LNS 157 ***(refd)***
PP v. Sukumaran Sudram [1999] 4 CLJ 242 HC ***(refd)***
PP v. Suzie Adrina Ahmad [2006] 3 CLJ 889 CA ***(refd)***
PP v. Tan Kim Piow [2006] 3 CLJ 717 CA ***(refd)***
R v. Ashwell [1885] 16 QBD 190 ***(refd)***
Ramis Muniandy v. PP [2001] 3 SLR 534 ***(refd)***
Saad Ibrahim v. PP [1967] 1 LNS 154 HC ***(refd)***
Toh Ah Loh & Mak Tin v. Rex [1948] 1 LNS 72 HC ***(refd)***
Warner v. Metropolitan Police Commissioner [1968] 2 All ER 356 ***(refd)***
Wjchai Onprom v. PP [2006] 3 CLJ 724 CA ***(refd)***
Y Jeyamuraly Yesiah v. PP [2007] 5 CLJ 605 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 180(1), (4)
Dangerous Drugs Act 1952, ss. 2, 6, 37(da)(vi), 39A(2), 39B(1)(a), (2)

For the accused - Zamri Idrus; M/s Adri Hisham & Rakan-Rakan
For the prosecution - Juanita Mohd Said, AG's Chambers

Reported by Suhainah Wahiduddin

JUDGMENT

Jeffrey Tan J:

[1] The accused was tried for the following capital offence.

> Bahawa kamu pada 12.06.2003 jam lebih kurang 6.30 petang, di dalam Kedai Destina Pam Minyak Projet, Taman Tampoi Utama, Tampoi, Johor Bahru, dalam Daerah Johor Bahru, dalam Negeri Johor Darul Ta'zim telah didapati mengedar dadah berbahaya sejumlah 981.4 gram cannabis dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] Of the six witnesses who testified for the prosecution, only two (SP1 and SP3) were allegedly at the scene.

[3] SP1 (Indran Irwan bin Ismail), the assistant manager of a petrol station known as Kedai Destina, Pam Minyak Projet, Taman Tampoi Utama, Tampoi, Johor Bahru (for that petrol station, see photograph P3(1)), testified that between 5pm to 6pm on 12 June 2003 he was behind the counter of the said petrol station. It was then that the police arrested the accused who was near a table inside Kedai Destina (for the place of arrest, see the mark "x" made by SP1 on photograph P3(4)). He did not see the accused enter Kedai Destina. Under cross-examination, SP1 testified that there were about three or four other employees on duty on that day. There would usually be two employees at the counter. Inside Kedai Destina, there were two tables for patrons. When the accused was arrested, there were three or four persons inside Kedai Destina. The police were not in uniform. He did not see the accused at one of the tables. He could not be sure if the accused were at one of the tables with another person. He had not seen the accused before the incident. The arrest was over within 30 seconds. Before the incident, the police did not reveal themselves. After the arrest, one Inspector Arshad introduced himself. Under re-examination, SP1 said that the accused was the only person who was arrested.

[4] SP3 (Chief Inspector Arshad bin Kamaruddin) testified that at 2pm on 12 June 2003, he received information of a drug trafficking activity and of a Malay male with motorcycle JDD 7870 at Pam Minyak Projet, Taman Tampoi Utama. He organised a police party of seven men and proceeded to that place. They

reached there at 5.30pm and took their assigned positions. He was stationed inside Kedai Destina. Corporals Payaman and Mohd Arif sat at one of the tables near the glass panel. About one and a half hours later, a motorcycle (JDD 7870) stopped in front of Kedai Destina. The rider (identified as the accused) had a black sling bag slung across his shoulder. The accused entered Kedai Destina and sat at one of the tables, next to Corporal Payaman. He walked, closely followed by Corporals Payaman and Mohd Arif, towards the accused. He identified himself. He asked the accused for his identity card. He found nothing incriminating on the the body of the accused. He took possession of the black sling bag slung across the shoulder of the accused. He searched the sling bag in the presence of the accused. Inside the sling bag was an orange plastic bag containing a compressed block of plant material wrapped in translucent cellophane tape and aluminium foil. P4(1) was the photograph of the black sling bag. P4 (2 & 3) were photographs of the black sling bag and its contents. He informed the accused of the offence he had committed, and instructed Corporal Payaman to handcuff the accused. The entire police party then escorted the accused to the police station. He retained custody of all exhibits. At the police station, he marked the sling bag and compressed block with his signature and pertinent date. He prepared a search list (P5) and lodged a police report (P6 – admitted as proof of the report but not of the facts asserted therein). At about 10pm, he handed all exhibits, search list, police report, and accused to the investigation officer (SP5). SP3 duly identified P7 as the handing over list, P8A as the black sling bag, P8B as the orange plastic bag, and P8C as the translucent cellophane tape and aluminium foil.

[5] Under cross-examination, SP3 said that before the arrival of the accused, he was at the rear portion of Kedai Destina. There were three employees on duty. He could not remember whether he identified himself when he arrived at Kedai Destina, or whether there were employees of Kedai Destina at the counter. When he arrived, there were no members of the public inside Kedai Destina. Until the arrival of the accused, no members of the public had entered Kedai Destina. At the time of the arrest, there were no members of the public inside Kedai Destina. He did not converse with the employees of Kedai Destina. After the arrest, he identified himself to the employees of Kedai Destina. The entire police party and accused proceeded to the police station shortly

A after the arrest. SP3 disagreed with learned counsel who proposed that the accused was seated with another person. SP3 was not re-examined.

[6] As for the other prosecution witnesses, SP2 (Corporal B Mazlan bin Mohd Zain) testified that he took photographs P3 (1-4) and P4 (1-3), while SP4 (Sergeant Anwar bin Mohd Din) testified that he took over the duties of the store-keeper (Corporal Jagit Singh) who had retired, and that the pertinent exhibits were registered under registration number 562/03 at the exhibits store.

C **[7]** SP5 (Chief Inspector Arman bin Ibrahim) testified that SP3 handed the said exhibits, police report, search list and accused to him, that he first marked the exhibits and then had them under lock and key until 16 June 2003, when he handed them in a sealed box to a government chemist (SP6) for analysis, that SP6 D returned the box of exhibits to him on 6 October 2003, and that he handed the box of exhibits to Corporal Jagit Singh on 27 October 2003 for safekeeping at the exhibits store.

[8] Under cross-examination, SP5 said that fingerprints were not E lifted from the drug exhibits. SP5 disagreed that the drug exhibits had been tampered, that his investigation was incomplete, that the drug exhibits were not the exhibits handed to him, that he did not investigate the manner in which the accused had carried the sling bag, and or that the accused had not carried the sling bag as F alleged. SP5 was not re-examined.

[9] It was the unchallenged testimony of the government chemist, Abdullah bin Mohd Yusof (SP6), that the drug exhibits contained 981.4 grams of cannabis.

G **[10]** At the close of the prosecution case, Mr Zambri Idrus for the accused submitted that it was only proved that the accused was in possession of the orange plastic bag. "It was not proved that the accused was in possession of the cannabis in the bag." Possession must be first proved before s. 37(da) could be invoked. H Knowledge is a prerequisite of possession. There was no proof of an overt act (counsel cited *Y Jevamuraly Yesiah v. PP* [2007] 5 CLJ 605). Only passive possession was proved. There was no evidence that the accused tried to evade arrest. There was a break in the chain of evidence on the custody of the drug I exhibits. There was no evidence that the drug exhibits were returned to the cabinet after they were photographed on 15 June 2003.

[11] The learned deputy prosecutor, Puan Juanita bte Mohd Said, made the following points in her written and oral submission. The black sling bag was slung across the shoulder of the accused. In *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337, it was held by the Federal Court per Arifin Zakaria FCJ, that the fact that the contents were hidden from view, while relevant in determining whether the requisite knowledge was absent, should still not be given too much weight, and that the finding of knowledge, or the rebuttal of it, is an inference to be drawn from all the facts and circumstances, giving due weight to the credibility of the witnesses. In *Ramis Muniandy v. PP* [2001] 3 SLR 534, it was held by the Singapore Court of Appeal that physical control in the absence of any reasonable explanation was sufficient to lead to a strong inference of knowledge. In *Warner v. Metropolitan Police Commissioner* [1968] 2 All ER 356, where the House of Lords was asked to answer if a defendant is deemed to be in possession of a prohibited substance when to his knowledge he is in physical possession of the substance but is unaware of its true nature, Lord Reid held that it would be pedantic to hold that it must be shown that the accused knew precisely which drugs he held in his possession. In *PP v. Ouseng Sama-Ae* [2008] 1 CLJ 337, it was held by the Court of Appeal per Gopal Sri Ram JCA, that the drug found was far in excess of what may be needed for personal consumption and in the absence of any explanation, it is a fair inference that the drug was intended for some person. The accused must know he was carrying a bag. The fact that the drug in question was the only thing in the bag proved that the accused had knowledge of the thing carried. Section 37(da) should be invoked. There was no break in the chain of evidence on the custody of the drug exhibits. All exhibits were properly marked and identified.

[12] Section 180(1) of the Criminal Procedure Code (Code) provides that "when the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a *prima facie* case against the accused". "A *prima facie* case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction" (s. 180(4) of the Code which came into effect on 7 September 2007 "cannot apply retrospectively": *PP v. Hanif Basree Abdul Rahman* [2008] 4 CLJ 1 per Zaki Azmi PCA), which statutory definition

more or less codified the long-standing pronouncement in *PP v. Sukumaran Sudram* [1999] 4 CLJ 242, that post amendment Act A979 "a *prima facie* case is made out where there is sufficient credible evidence establishing each essential ingredient of the offence for a supposition of guilt if it is not answered by the accused".

[13] The instant charge was trafficking in cannabis, a dangerous drug. The first ingredient of the offence was trafficking (*PP v. Ahmad Rashdan bin Shamsher* [1994] 1 LNS 126). "Trafficking" is defined in s. 2 of the Act to include, "the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying, or distributing any dangerous drug." However in *PP v. Mohd Farid Mohd Sukis & Anor* [2002] 8 CLJ 814, Augustine Paul J, as he then was, qualified that "the mere act of, say, 'keeping', or 'concealing' or 'carrying' dangerous drugs as enumerated in s. 2 of the Act will not constitute 'trafficking' without any further evidence of an intention to trade or deal in them".

[14] If the act were no more than possession, s. 37(da)(vi) of the Dangerous Drugs Act 1952 (Act) provides, "any person who is found in possession of 200 grammes or more in weight of cannabis otherwise than in accordance with the authority of this act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug".

[15] The unchallenged evidence was that the accused had across his shoulder a sling bag and that inside that sling bag was an orange plastic bag containing a single compressed slab or block of 981.4 grams of cannabis, wrapped first with a layer of translucent cellophane tape and then with a layer of aluminium foil. That was the total evidence against the accused. But what did that prove, in relation to the charge?

[16] There is no statutory definition of 'possession', a word said to be enigmatic and vague. However, judicial pronouncements on its meaning include invariably some degree of custody or control, and knowledge of the custody or control (see *Toh Ah Loh & Mak Tin v. Rex* [1948] 1 LNS 72; *Ho Seng Seng v. Rex* [1951] 1 LNS 25; *Leow Nghee Lim v. Regina* [1955] 1 LNS 53; *Director of Prosecutions v. Brooks* [1974] AC 862; *PP v. Lai Ah Bee* [1974] 1 LNS 119; *Badrulsham bin Baharom v. PP* [1988] 2 MLJ 585) but

'a man has not possession of that of the existence of which he is unaware' (per Cave J in *R v. Ashwell* [1885] 16 QBD 190 at p. 201; see also *Saad Ibrahim v. PP* [1967] 1 LNS 154). "Mere knowledge however is not sufficient to establish possession" (see *Gooi Loo Seng v. PP* [1993] 3 CLJ 1), but the power of disposal (see *PP v. Ang Boo Foo* [1981] 1 MLJ 40) is no longer an ingredient needed to support a conviction in a dangerous drugs trial (see *PP v. Kau Joo Huat* [1988] 1 CLJ 477; [1988] 1 CLJ (Rep) 258). In *Leow Nghee Lim*, Taylor J explained the meaning of custody "as having care or guardianship ... knowledge of the existence and whereabouts of the goods and power of control over them, not amounting to possession", while Ambrose J in *Neo Koon Cheo v. Regina* [1959] 1 LNS 64 explained that "custody is actual physical control and control must be construed to mean any form of control other than actual physical control".

[17] Two recent cases illustrate that even without actual physical custody, it could still be possession. In *PP v. Karim AB Jabar* [2008] 5 CLJ 173, the respondent was tried under s. 39B(1)(a) of the Act. The High Court made the following findings; (a) the respondent was driving motorcar PDJ 31 that the police party stopped; (b) members of the police raiding party did identify themselves as police officers to the respondent; (c) the respondent put up a scuffle and was promptly placed under arrest; (d) the police did find several packages containing dangerous drugs from the front passenger seat and the boot of the car. At the close of the case for the prosecution, the High Court acquitted and discharged the respondent without calling for his defence. On appeal, the Court of Appeal per Gopal Sri Ram JCA held that the proximity of the respondent to the drugs at the front passenger seat was a fact relevant to establish actual physical possession, and that given that the quantity of drugs was far in excess of that required for personal use, there ought to have been drawn from the totality of the evidence the inference that the respondent was conveying the drugs for the purpose of trafficking in it. In *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337, the respondent was charged with trafficking in 4,826.9 grams of cannabis. The evidence was that one package under the driver's seat and two packages under the front passenger's seat in the car driven by the respondent contained cannabis. The respondent's defence was that although he knew the existence of the three packages in the car, which he claimed were put in the car by Jiri, he had no

knowledge that they contained drugs. The respondent was convicted. The Court of Appeal held that the trial court had erred in admitting the cautioned statement, set aside the conviction under s. 39B(2) of the Act and substituted with an offence under s. 6, punishable under s. 39A(2) of the Act, held that there was sufficient evidence establishing beyond doubt that the respondent had custody and control of the three packages, and invoked the presumption of possession. However, the Federal Court held that apart from the cautioned statement there was sufficient evidence to support the finding of the trial court, and that on the facts and in the circumstances it ought to be the finding that the respondent had possession of the drug independent of the statutory presumption under s. 37(d) of the Act.

[18] As for the proof of knowledge, it is often a matter of inference (for a detailed discussion on the proof of knowledge by drawing inferences, see *PP v. Reza Mohd Shah Ahmad Shah* [2002] 1 LNS 157). In *Mohamad Radzi Abu Bakar v. PP* [2002] 3 CLJ 794, where the facts were that a customs officer went to the middle of the road and held up a stop sign which read 'Berhenti Kastam' ('Stop Customs') to intercept an approaching motorcycle. The rider did not stop, made a turn and headed away in the opposite direction. At the same time the pillion rider jumped from the motorcycle and ran away. Both rider and pillion were eventually arrested. The rider was wearing a long sleeved jacket over a short-sleeved jacket. From the right inner pocket of the long sleeved jacket a package wrapped in Thai newspaper was taken out and another similarly wrapped package was taken from the left inner pocket. From the left and right pockets of the inner jacket were recovered similarly wrapped packages. All four packages recovered from the two jackets contained dry plant material were found to be 'cannabis' as defined under the Act.

[19] Pertinent to "inferences", "possession", "direct evidence of possession", and "direct evidence of trafficking", KG Vohrah JCA imparted the following:

> The case in this appeal is not complicated and the facts establishing a *prima facie* are obvious. The learned judge had relied on s. 37(d) of the Act from the fact of custody and control of the four packages of cannabis to presume possession of and knowledge of the cannabis. In actual fact there was no necessity for him to have relied on the presumption as the evidence was overwhelming that he was in possession of the cannabis and that

he knew that the drug was cannabis. The evidence showed that he was wearing not one but two jackets. The top long sleeved jacket had two bundles of the cannabis, P4 and P5, one in the right and the other in the left inner pockets of the jacket the gross weight being about 180g ... Anyone wearing it would have felt the packages sticking against the chest and the jacket being weighed down by the two packages. Equally telling was the presence on his person of the inner short sleeved jacket which was weighed down by the two packages of cannabis, P6 and P7, one in the right and the other in the left pocket of the jacket, having a gross weight of 192g ... There cannot have been but a deliberate Act on his part to have worn two jackets with packages and it would be an attack on common sense to say that he did not know the packages were packages of cannabis. In any event from the nature of the cross-examination of the witnesses there was no question put to the prosecution witnesses to show that the accused was not aware that he was carrying the four packages or that he was not aware that he was carrying cannabis ...

The other telling piece of evidence which has to be taken into account which shows that clearly that the accused was aware of the packages and was aware of its incriminatory nature was that when he was signalled to stop by a customs officer who held up a customs stop sign 'Berhenti Kastam'. Instead of stopping he turned around and headed in the opposite direction.

Thus, at the close of the prosecution case, there was sufficient positive evidentiary basis that the accused had actual possession and knowledge of the said cannabis and there was no necessity to merely presume that he had possession and knowledge thereof.

As for the trafficking, having been in possession of the cannabis and being aware of its nature there was also positive evidence that he fell within the meaning of 'trafficking' as defined in s. 2 of the Act, which states:

In this Act, unless the context otherwise requires:

> 'trafficking' includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, **transporting, carrying**, sending, delivering, procuring, supplying, or distributing any dangerous drug. (emphasis added)

A There was no evidence to show the context to be otherwise that he was carrying and transporting, all the while knowing what he was doing - knowingly carrying the drugs on his person and riding on a motorcycle with it from one place to another and knowing the nature of the drugs as being dangerous drugs, to wit cannabis. There was very strong *prima facie* evidence of trafficking in the dangerous drug.

Thus when the trial judge called upon the accused to make his defence on the charge of trafficking in the cannabis there was ample positive evidence for him to do so although he had invoked s. 37(1)(da) to presume that the accused was trafficking in the drug and the accused elected to make his defence on oath.

[20] In so far as the Act is concerned, "any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug" (s. 37(d) of the Act).

[21] A finding of custody or control raises a presumption of possession and knowledge of the nature of the drug. However, there cannot be any automatic application of the presumption of trafficking under s. 37(da) upon the presumption of possession and knowledge under s. 37(d) (*Muhammed Hassan v. PP* [1998] 2 CLJ 170). "To constitute possession under s. 37(da) of the Act ... there must be an express affirmative finding of possession ... "(*Muhammed bin Hassan* at p. 191). "To arrive at the presumption of trafficking under s. 37(da), a finding of being in possession of the drug is necessary" (*Muhammed Hassan* at p. 190). Without an express affirmative finding of possession, s. 37(da) cannot be applied, and trafficking must necessarily be made out by evidence. Trafficking is not made out on just a finding of custody or control. Accordingly, without recourse to s. 37(da) and in the absence of any other evidence, in *Y Jevamuraly Yesiah v. PP* [2007] 5 CLJ 605, the Court of Appeal per Mohd Ghazali JCA held that the evidence only established that the appellant was in custody and control of the dangerous drugs but not of some other overt act.

The evidence clearly showed that the said biscuit tin which contained the said dangerous drugs was in the custody and under the control of the appellant. This is what is termed as passive possession in several authorities. That the appellant had knowledge of the said dangerous drugs in the said biscuit tin has to be inferred from the circumstances as discussed earlier. We find that

the evidence showed that he had knowledge. But to constitute trafficking under s. 39B(1) of the Act, there must be *mens rea* possession accompanied by some overt act. We find no such evidence in this instant appeal. Further, we cannot use the presumption of possession under s. 37(d) of the Act to invoke the presumption of trafficking under s. 37(da) of the Act as has been decided in *Muhammad bin Hassan v. Public Prosecutor* [1998] 2 CLJ 170 (see also *Pendakwa Raya v. Tan Tatt Eek* [2005] 1 CLJ 713).

[22] The rationale is that with a finding of custody or control, but without recourse to s. 37(da), there must be evidence of an overt act to prove trafficking. But it had not always worked out that way. In *PP v. Tan Kim Piow* [2006] 3 CLJ 717, the Court of Appeal held that independent of any presumption it was possession but nonetheless ruled that there must be evidence of an overt act. Possession was the express affirmative finding, but s. 37(da) was not invoked.

We find it unnecessary to deal with this argument. In our judgment, independent of any presumption there is sufficient evidence led by the prosecution from which a strong inference that the accused had knowledge of the drug and that it was in his exclusive physical possession may be drawn. And exclusive possession is a *sine qua non* in a case of this nature (see *Choo Yoke Choy v. Public Prosecutor* [1992] 4 CLJ 1791; [1992] 1 CLJ (Rep) 43).

... we would observe that the facts proved in the present instance lead to the irresistible inference that the accused was aware of his possession; he knew the nature of the drug he possessed and he had the power of disposal over it. In other words, the accused had *mens rea* possession (see *Saad Ibrahim v Public Prosecutor* [1967] 1 LNS 54). We would here emphasise that knowledge like other states of mind is a fact that is to be inferred from surrounding circumstances (see *Wong Lam Noi v. Public Prosecutor* [1998] 1 CLJ 37 and *Tay Kah Tiang v. Public Prosecutor* [2001] 2 SLR 305).

... The learned deputy also made a rather diffident second submission that we should remit this case for defence to be called on the original charge of trafficking. However, under pressure of argument she quite rightly retreated from the position she originally took. We must make it abundantly clear that taking the prosecution's case at its highest does not even remotely support the charge of trafficking. For, all that was proved here were the elements of passive *mens rea* possession. To constitute trafficking

A under s. 39B(1) of the Act, there must be *mens rea* possession accompanied by some overt act: mere passive possession is insufficient (see *Ong Ah Chuan v. Public Prosecutor* [1981] 1 LNS 81; *Mohamad Yazri Minhat v. Public Prosecutor* [2003] 2 CLJ 65).

B **[23]** And in *Wjchai Onprom v. PP* [2006] 3 CLJ 724, the Court of Appeal reiterated that possession in ss. 2 and 37(da) is not mere physical possession but *mens rea* possession (for meaning of "*mens rea* possession", see *Saad Ibrahim v. PP* but as qualified by *Kau Joo Huat*). The affirmative finding of the appellate court was C "*mens rea* possession", but it was nonetheless held that "*mens rea* possession" must be accompanied by some overt act.

> Because of the way in which the case was tried and argued in the court below, we think it apposite to re-state the law on the subject of actual trafficking of drugs. In a case where the D prosecution is relying on evidence of possession to prove actual trafficking by having resort to the definition in s. 2, such possession must be accompanied by some overt act on the part of the accused to be able to constitute trafficking. See, *Public Prosecutor v. Hairul Din bin Zainal Abidin* [2001] 6 CLJ 480; *Public Prosecutor v. Nik Ahmad Aman* [2002] 6 CLJ 369; *Mohamad Yazri* E *bin Minhat v. Public Prosecutor* [2003] 2 CLJ 65. In other words, mere passive possession is insufficient to establish a case of actual trafficking.
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> Where the prosecution relies on possession accompanied by some overt act on the part of the accused as constituting the offence of F trafficking, the court is concerned with two questions. First, whether the accused had *mens rea* possession of the proscribed drug. This is because the word 'possession' appearing in ss. 2 and 37(da) of the Act does not connote mere physical possession. Second, the purpose for which he had the proscribed drug in his G possession. Although in most, if not all cases, the evidence presented to the court is common to both questions it is nevertheless important to address the two questions.

[24] *Mohamad Yazri Minhat v. PP* [2003] 2 CLJ 65 was cited in both *PP v. Tan Kim Piow* and *Wjchai Onprom v. PP* to support H the proposition that there must be *mens rea* possession accompanied by some overt act to constitute trafficking under s. 39B(1) of the Act. In *Mohamad Yazri Minhat v. PP*, the trial court held "that the accused was in exclusive control and custody of the cannabis in the car" and that "the accused was in I possession of the cannabis". The law report was not clear as to

whether the trial court's finding of possession was by recourse to s. 37(d) or was an affirmative finding of possession under s. 37(da). In any event, the Court of Appeal found as follows:

> It is plain and obvious from a reading of the judgment as a whole that the learned judge had the large quantity of drugs here in the forefront of his mind. The several passages in his judgment reflect the learned judge's satisfaction that the appellant could not have had such a large quantity of drugs in his possession, custody and control save for the purpose of trafficking it to others known or unknown. That explains the transporting by the appellant of the drug in the car in which it was found. For that reason we must with respect reject the arguments advanced to us by learned counsel for the appellant.

[25] If it were a case of an affirmative finding of possession, then s. 37(da) was not invoked in *Mohamad Yazri Minhat v. PP*, *albeit* the humongous quantity (133 kilograms) of dangerous drugs. If s. 37(da) were invoked, then there should be no necessity for the exercise to find the purpose of the transporting of the said drugs, as upon positive proof of possession without relying on s. 37(d), the prosecution was entitled to rely on s. 37(da) to support a charge of trafficking. That was the pronouncement of the Federal Court in *PP v. Abdul Manaf Muhamad Hassan* [2006] 2 CLJ 129, where Arifin Zakaria FJ said as follows:

> It ought to be stated at the outset that the decision in *Muhammed bin Hassan* only prohibits the use of double presumptions under ss. 37(d) and 37(da) of the Act. It is, therefore, open to the prosecution to rely on either of the presumptions. In other words, the prosecution may positively prove possession without relying on the presumption under s. 37(d) of the Act and go on to rely on the presumption of trafficking under s. 37(da) of the Act to support a charge under s. 39B of the Act. See *Tunde Apatira & Ors v. Public Prosecutor; Msimanga Lesaly v. Public Prosecutor* [2005] 1 CLJ 398, a decision of Court of Appeal which was confirmed by this court in Federal Court Criminal Appeal No 05-27 of 2004(K). Conversely, the prosecution may rely on the presumption under s. 37(d) to prove possession and seek to prove by affirmative evidence (independent of the presumption under s. 37(da)) that the accused was in fact trafficking in the dangerous drug.

... where an accused is shown to be a trafficker under s. 39B(1)(a) of the Act, the weight of the drug he or she carries has no bearing whatsoever on his or her commission of the offence" (*PP v. Suzie Adrina Ahmad* [2006] 3 CLJ 889 per Gopal Sri Ram JCA).

[26] The prosecution may rely on direct evidence of trafficking, of the drugs found in possession. In *Msimanga Lesaly v. PP* [2004] 1 LNS 651, it was contended that the trial court had resort to s. 37(d) to presume possession and then invoked s. 37(da) to hold that the appellant was a trafficker in the particular proscribed drug. Gopal Sri Ram JCA said:

> We have carefully scrutinised the way in which the learned judge directed himself on the law and the evidence and we find no justification in the criticism levelled against his approach to the case. It is quite apparent that the learned judge appreciated this to be a case where there was direct evidence of trafficking and it is to that evidence that he directed his mind. It was only after he had determined as a fact that the appellant was actually trafficking the heroin found in her possession that he proceeded to convict her.

[27] There was no direct evidence of trafficking in the instant case. Rather, the case against the accused was built on the solitary unchallenged fact that the accused had across his shoulder a sling bag and that inside that sling bag was an orange plastic bag containing a single compressed slab or block of 981.4 grams of cannabis, wrapped with first a layer of translucent cellophane tape and then a layer of aluminium foil. On that unchallenged fact, it could be most reasonably concluded that the accused must have had knowledge of his custody and or control and or possession of the sling bag. It could also be reasonably inferred that the accused must have had knowledge of the contents inside that sling bag in his custody control and or possession. On the facts, and in the absence of an explanation, the reasonable inference must be that the accused was aware of that in his custody, control and or possession. It was definitely a case of custody, control and or possession and with full knowledge thereof.

[28] But was it a case of custody, control and or possession? The answer must be that it could be all 3. It could be custody, control, or possession. Since it could be possession, then the prosecution should be entitled to rely on the presumption of trafficking under s. 37(da) of the Act. In *Ong Ah Chuan v. PP* [1980] 1 LNS 181, the Privy Council per Lord Diplock held "the larger the quantity of drugs involved the stronger the inference that they were not intended for personal consumption". That by implication would mean, the lesser the quantity, the weaker the presumption that they were not intended for personal

consumption. In the instant case, the quantity involved was less than five times the statutory minimum. That quantity was undoubtedly above the minimum. But that quantity, *albeit* not small, was not such that it could be irresistibly inferred that it could not have been for personal consumption. The total absence of any evidence of an overt Act would say that the circumstance that it could have been intended for personal consumption could not be ruled out. If it were possession, then trafficking was made out only on a not too strong presumption of trafficking. Of course, if it were a case of custody and or control, then trafficking was not made out at all in the absence of any evidence of an overt act. The fate of the accused hung on that balance. A ruling that it was possession would attract the presumption of trafficking. A ruling that it was custody and or control would mean that trafficking was not made. In the face of such a difficult choice, it would surely seem more just and fair to give the benefit to the accused, to find that the lesser offence, not the more serious, had been made out.

[29] It was for those reasons that the charge was amended to one of possession and punishable under s. 39A(2) of the Act, to which amended charge the accused pleaded thereto and was accordingly sentenced to serve a term of imprisonment of nine years and to suffer ten strokes of the cane.